KAPT (B) HJ MOHAMAD ISMAIL

v.

PERWIRA AFFIN BANK BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2(S4)-22-544-1995]
28 SEPTEMBER 2000

CIVIL PROCEDURE: *Damages - Loss of reputation and business - Advertisement by official assignee declaring plaintiff bankrupt when by that time plaintiff had settled defendant's debt in full - Whether defendant negligent in not taking necessary steps to annul receiving and adjudication orders made against plaintiff - Whether plaintiff proved damages*

This was the plaintiff's action for damages against the defendant bank for loss of reputation and business due to the advertisement by the official assignee ('OA') in a local newspaper declaring the plaintiff a bankrupt. It was the plaintiff's contention that he had settled the debt owing to the defendant in full and therefore the defendant should have taken the necessary steps to annul the receiving and adjudicating orders made against him. The trial judge found the defendant negligent and ordered damages to be assessed by the senior assistant registrar ('SAR'). The SAR, however, held that the plaintiff failed to prove damages. The plaintiff now appealed.

Held:

[1] Based on the authorities concerned, the plaintiff ought to proceed to file a suit for defamation in his claim for damages for injury to reputation or to feelings. However, the plaintiff could not maintain a claim in defamation against the defendant because the publication of the advertisement was by the OA and that was done pursuant to the OA's duty to do so. Further, such publication was of true facts in that the plaintiff was indeed adjudicated a bankrupt then.

[2] The plaintiff's cause of action could only be in negligence and the trial judge had indeed found the defendant liable in negligence. However, the burden still remained with the plaintiff to prove his loss.

[3] There was something improper about the letter from the plaintiff's solicitors to the defendant. The plaintiff did not explain why he did not want the defendant to state that he had settled the claim in full in the affidavit in support of the defendant's application to court to rescind the adjudication order made against him.

[4] There was also a delay on the part of the plaintiff to annul the orders made against him and that delay was unexplained. Unless expressly agreed that the defendant would file the application to annul the said orders, the plaintiff should have filed the application to annul the orders soon after receiving the defendant's confirmation that it would support such an application by the plaintiff.

[5] As the plaintiff led no other evidence, other than his own, to seek damages, the court was satisfied that the plaintiff was not able to prove any loss or damages. Even on the question of economic loss, the plaintiff led no evidence in support.

[Appeal dismissed.]

Case(s) referred to:
Addis v. Gramophone Company Limited [1909] AC 488 ***(refd)***
Balfour v. AG [1991] 1 NZLR 519 ***(refd)***
Bell-Booth Group Ltd v. Attorney-General [1989] 3 NZLR 148 ***(refd)***
Foaminol Laboratories Ltd v. British Artid Plastics Ltd [1940] 2 All ER 393 ***(refd)***
Joyce v. Sengupta & Anor [1993] 1 WLR 337 ***(refd)***
Kapt(B) Hj Mohamad Ismail v. Perwira Affin Bank Bhd [1999] 4 CLJ 199 ***(refd)***
Lonrho Plc & Ors v Fayed & Oths (No 5) [1993] 1 WLR 1489 ***(refd)***
Marbe v. George Edwardes (Daly's Theatre) Limited & Anor [1928] 1 KB 269 ***(refd)***
South Pacific Manufacturing Co Ltd v. New Zealand Security Consultants & Investigations Ltd [1992] 1 NZLR 282 ***(refd)***
Spring v. Guardian Assurance plc & Oths [1994] 3 All ER 129 ***(refd)***
Thurston v. Charles XXI [1904-5] TLR 659 ***(refd)***
Uniphone Sdn Bhd v. Chin Boon Lit & Anor [1998] 6 MLJ 441 ***(refd)***
Wilson & Anor v. United Counties Bank Ltd [1920] AC 102 ***(refd)***

For the appellant/plaintiff - V Rajadevan (R Thayakugan with him); M/s Rajadevan & Assoc
For the respondent/defendant - Yoong Sin Min (Siti Zeenath Shaik Ibrahim with him); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The defendant bank sued the plaintiff for credit facilities granted to the plaintiff and subsequently obtained judgment in default on 15 May 1987 with interest and costs. Because of the plaintiff's non-payment the amount escalated to RM62,658.57 and the bank then filed a bankruptcy notice for the said sum

and the plaintiff accepted personal service of the said bankruptcy notice. The bank then proceeded to file the creditor's petition on 6 September 1991 and the plaintiff again accepted personal service of the same. A receiving order and an adjudication order were made against the plaintiff on 5 July 1993 and he was thus adjudicated a bankrupt. The plaintiff then negotiated with the bank which agreed to accept RM60,000 in full settlement. The bank's solicitors then wrote to the plaintiff's solicitors a letter dated 1 October 1993. The final paragraph of the said letter reads as follows:

> Our clients have confirmed that the above borrower has fully settled his account. We have instructions to consent to your application to annul the Receiving and Adjudicating Orders. Kindly serve the necessary papers on us.

The plaintiff had, in his letter dated 30 September 1993 enclosing the cheques in full settlement, said in para. 5 as follows:

> 5. Kindly therefore instruct your Solicitors forthwith to withdraw and annul the Adjudicating and Receiving Order made against me on 5th July, 1993. Please extend me a copy of your instruction to your Solicitors withdrawing the same.

Thereafter neither party did anything until 9 February 1994 when the plaintiff's solicitors wrote to the bank's solicitors. The said letter, *inter alia*, reads as follows:

> We shall be grateful if you file the necessary application to Court to rescind the Adjudication Order made against our client on 6.7.1993 under Section 105 of the Bankruptcy Act on the grounds that our client ought not to be made a bankrupt since he has been regularly servicing the overdraft facility with your client.
>
> Kindly avoid stating in the affidavit in support that the debt has been fully settled.

In the meantime, an advertisement from the Official Assignee (OA) that the plaintiff is a bankrupt appeared in the Utusan Malaysia on 10 February 1994 directing all debtors of the plaintiff to make payment to the OA directly. The plaintiff then filed an application on 17 February 1994 to annul the orders made against him and on 9 March 1994 the court annulled the receiving and adjudication orders made against the plaintiff.

On 16 November 1995 the plaintiff filed this suit against the defendant bank. The statement of claim of the plaintiff was no masterpiece of draftsmanship. In para. 8 of the said statement of claim the plaintiff contended that the advertisement of the OA had affected his good name and reputation and that he had been brought into public odium, hatred and disrepute and that this had

affected his business. He then pleaded various items of special damages. In the alternative the plaintiff pleaded negligence and in respect of the particulars of negligence he pleaded that the defendant was negligent in failing to take the necessary action to annul the receiving and adjudication orders and also in failing to inform the OA that the plaintiff had settled the debt in full. On 18 December 1998 after going through their respective submissions my learned sister Datin Paduka Rahmah Hussain found for the plaintiff only on the issue of negligence and ordered damages to be assessed (see [1999] 4 CLJ 199). Whilst the defendant has appealed against that decision the plaintiff has not.

After numerous hearings on the issue of damages, the learned Senior Assistant Registrar ('SAR') held on 16 February 2000 that the plaintiff had failed to prove damages. She held that by failing to call witnesses from Mindef, the plaintiff had failed to prove that the alleged loss suffered by the plaintiff by Mindef not renewing his dobi contract and the sewing contract, was indeed due to the wrongful advertisement. Having perused the decision of the learned SAR I note that her decision was merely confined to special damages only. She had not, in her decision, referred to the claim for general damages made by the plaintiff. Since this appeal from that decision is in law a re-hearing before me and since Mr. Rajadevan has conceded that the appeal is solely on general damages and that he is not pursuing the lack of award on special damages, I will confine my decision only to the question as to whether the appellant is entitled to a claim for general damages.

Findings Of The Court

This appeal raises a very novel issue. The question is, is the plaintiff entitled to general damages in a situation where the negligence of the defendant had led to the publication of a defamatory article of the plaintiff. Putting it differently, can the plaintiff claim for loss of reputation in negligence or ought the claim for loss of reputation be founded on the tort of libel.

One of the earliest decisions on this is the case of *Addis v. Gramophone Company Limited* [1909] AC 488. The plaintiff was employed as a manager of the defendant's business in Calcutta. The defendant then dismissed the plaintiff. The plaintiff filed a claim for breach of contract and was awarded damages for wrongful dismissal which included damages for the harsh and humiliating way in which he was dismissed. On appeal, the House of Lords was of the view that the plaintiff had indeed attempted to suggest that the manner of his dismissal had cast a slur upon his character and that he had "really endeavoured to claim damages for defamation and to turn the action for the loss of the benefit of the contract into an action of tort ..." (Lord Gorell at 501/502). Lord Atkinson expressed his view at p. 498 very emphatically when he said:

> I have been unable to find any case decided in this country in which any countenance is given to the notion that a dismissed employee can recover in the shape of exemplary damages for illegal dismissal, in effect damages for defamation, for it amounts to that ... .

However, the House of Lords reiterated the proposition that damages for loss of reputation cannot be recovered in an action founded upon a breach of contract except in three well-known cases, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions where the vendor of real estate, without any fault on his part, fails to make title.

Hallett J however extended the three exceptions set by the House of Lords. In *Foaminol Laboratories Ltd v. British Artid Plastics Ltd* [1940] 2 All ER 393 his Lordship recognised a further exception. He held that "if pecuniary loss can be established the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiffs from recovering in respect of that pecuniary loss" provided the plaintiff could prove with sufficient certainty the occurrence of the pecuniary loss and that the pecuniary loss was within the contemplation of the defaulting party.

In *Wilson & Anor v. United Counties Bank Ltd* [1920] AC 102 a trading customer who had become a bankrupt, together with his trustee in bankruptcy, sued the respondent bank for damages for breach of contract. The court found that the bank had agreed with the customer to supervise the financial side of his business during his absence on military service and to take all reasonable steps to maintain his credit and reputation and had by its negligence on the discharge of its duties under the agreement, caused the bankruptcy of the customer. The court awarded pound sterling 45,000 damages for the loss occasioned to the bankrupt's estate by the negligence of the bank and pound sterling 7,500 damages for the injury caused by that negligence to the bankrupt's credit and reputation. The House of Lords held that the right to claim damages for the injury to the bankrupt's credit and reputation did not pass to the trustee in bankruptcy, but remained in the bankrupt, and that, in the case of a trading customer, substantial damages were recoverable under this head of claim, without proof of special damages and that on the facts of the case, the damages awarded were not excessive. In giving his reason for so arriving at that decision, Lord Birkenhead LC said at p. 112:

> ... On principle the case seems to me to belong to that very special class of cases in which a banker, though his customer's account is in funds, nevertheless dishonours his cheque. The *ratio decidendi* in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the

credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit.

The court held that this was more so in this case "where the defendant has expressly contracted to sustain the financial credit of a trading customer and has committed a breach of his agreement". Lord Atkinson was even more expressive. This is what he said at p. 6:

> ... Major Wilson is not seeking to recover damages to any extent due to the breach, in such a manner as that of a contract not directly connected with his credit and reputation. He is seeking to recover damages for the injury caused to his credit and reputation by the defendants' neglect to perform the service they had by their contract bound themselves to perform – namely, to take all reasonable steps to maintain that credit and reputation. By withholding that service, the defendants directly caused Major Wilson to be ultimately made a bankrupt. It would appear to me that injury to the credit and reputation of a trader is not only a natural and reasonable result of his being made a bankrupt, *ie*, such a consequence as would, in the ordinary course of things, flow from it, but must, in the present case, have been in the contemplation of the parties when they entered into the contract as the result which would probably follow from the breach of it, and that the damages therefore are not too remote:

In *Marbe v. George Edwardes (Daly's Theatre) Limited & Anor* [1928] 1 KB 269, an actress who had acquired considerable reputation in the United States wanted to enhance her reputation as an actress in London. She was engaged by the defendant who operated a theatre in the West End. The agent stipulated that as a condition of her playing a particular part she would be advertised in a prominent and attractive manner. On the day of the dress rehearsal she was told that she was not to play the part because another actress who played an important part in the play would not allow her to perform for fear that the plaintiff would overshadow the other actress. Bankes LJ said at p. 281 as follows:

> ... In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity.

In *Thurston v. Charles XXI* [1904-5] TLR 659 the defendant wrongfully communicated to another person a letter which had been written by a third person to the plaintiff and which had got into the defendant's possession, and

the plaintiff brought an action to recover damages for the detention and conversion of the letter. The plaintiff also claimed damages for libel, alleging that the letter contained statements defamatory of her. The trial judge ruled that the occasion was privileged and the jury found that there was no malice. The action for libel was therefore dismissed but the jury was directed that in considering the question of damages for detention of the letter, it might take into account the damage caused to the plaintiff's reputation by the use to which it was put.

Coming to the case before me, liability has already been found against the defendant in negligence which means the trial judge was satisfied that there was a duty of care owed by the defendant to the plaintiff, that there was a breach of that duty and that as a result thereof the plaintiff has sustained damages and under damages I am called upon to consider only if the plaintiff has succeeded in showing he had suffered loss of general damages. Under this head the plaintiff contends that his reputation has been affected by the wrongful advertisement by the OA.

Firstly, it is obvious that the plaintiff could not maintain a claim in defamation against the defendant because the publication of the advertisement was by the OA, and that was done pursuant to his duty to do so and that such publication was of true facts in that the plaintiff was indeed adjudicated a bankrupt on 5 July 1993.

The New Zealand Court of Appeal in *Bell-Booth Group Ltd v. Attorney-General* [1989] 3 NZLR 148 took the view that a claim for mere loss of reputation is the proper subject of an action for defamation and cannot ordinarily be sustained by means of any other form of action. Since to an action for defamation truth is an absolute defence, the duty in defamation is not to defame without justification or privilege or otherwise than by way of fair comment. The court was of the view that *Bell-Booth* was seeking to add to those duties a duty to take care not to injure its reputation by true statements, a proposition which if accepted would be to introduce negligence law into a field for which it was not designed and was not appropriate. Indeed in *Uniphone Sdn Bhd v. Chin Boon Lit & Anor* [1998] 6 MLJ 441, I had occasion to consider the decision in *Bell-Booth*. Having considered the facts of the case in *Uniphone* I said at p. 446 as follows:

> It is my judgment that the tort of negligence ought not to restrict the freedom of speech, and restrain publishing statements which are true. It ought not to be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement could cause loss to a third party who admits to the truth of that statement.

In *Balfour v. AG* [1991] 1 NZLR 519 the plaintiff sued the government in negligence for stating in a memorandum that he was a homosexual, without a fair and reasonable investigation and claimed for general damages to his career and reputation. The Court of Appeal held that the attempt to merge defamation and negligence is to be resisted and dismissed the plaintiff's claim. In yet another New Zealand decision, the Court of Appeal in *South Pacific Manufacturing Co Ltd v. New Zealand Security Consultants & Investigations Ltd* [1992] 1 NZLR 282 held the view at p. 309 that:

> ... Redress of harm to reputation is the proper function of the law of defamation which with the various defences represents the balancing of competing values in ways considered appropriate in our law in the particular areas with which they are concerned. Thus qualified privilege and fair comment are subject to their own particular rules and in the case of qualified privilege malice is an ingredient of the tort. To allow an additional remedy in negligence which would not be subject to any such defences would undermine that balance. It is for reasons of this kind that we have held that justice does not require or warrant an importation of negligence law in this class of case.

In *Spring v. Guardian Assurance plc & Oths* [1994] 3 All ER 129 the House of Lords had occasion to refer to the New Zealand cases I have referred to in this judgment. The central issue in *Spring* as crystallised by Lord Goff of Chieveley was "whether a person who provides a reference in respect of another who was formerly engaged by him as a member of his staff may be liable in damages to that other in respect of economic loss suffered by him by reason of negligence in the preparation of the reference. That issue can, for the sake of convenience, be subdivided into two questions. (1) Whether the person who provided the reference *prima facie* owes a duty of care, in contract or tort, to the other in relation to the preparation of the reference. (2) If so, whether the existence of such a duty of care will nevertheless be negatived because it would, if recognised, pro tanto undermine the policy underlying the defence of qualified privilege in the law of defamation." A reading of *Spring* will show that there was no disapproval of the principles enunciated in the 3 New Zealand cases of *Bell-Booth, Balfour* and *South Pacific*. The House of Lords in fact referred to these cases with approval. The House of Lords held that there was a duty of care not to make a negligent misstatement which would cause **economic loss** (emphasis provided) to the plaintiff. The ratio can be distilled from the words of Lord Woolf at p. 176 of the judgment. He says:

> ... In an action for negligence, on the other hand, the subject of the reference will be primarily interested in and largely limited to his economic loss.

It would seem based on the decision of the House of Lords in *Spring*, that the plaintiff in the case before me cannot claim for mere loss of reputation in negligence and cannot claim damages in negligence without proving the

economic loss he has sustained. It is also necessary to bear in mind the words of the English Court of Appeal in *Joyce v. Sengupta & Anor* [1993] 1 WLR 337 at 348 wherein it held the view that "the remedy for such loss (all non-pecuniary) is an action for defamation in which, incidentally, damages for injury to feelings may be included in a general award of damages". Another case of relevance is the decision of the English Court of Appeal in *Lonrho Plc & Ors v Fayed & Oths (No 5)* [1993] 1 WLR 1489. The plaintiffs claimed against the defendants for conspiracy and for encouraging a third party to publish defamatory statements. Damages were claimed without stating the particulars of the damage suffered, similar to the case before me. On an application, the judge struck out the action as an abuse of the process of the court. The plaintiffs appealed and also applied for leave to amend the pleadings by alleging injury to the plaintiffs' reputation and feelings and pecuniary loss. The court held that the plaintiffs could recover damages for injury to reputation and injury to feelings only in an action for defamation and that such damages could not be recovered in an action for conspiracy. The court upheld the striking off of the suit and refused the application to amend.

With all these cases before me it would seem that if the plaintiff intends to claim damages for injury to reputation or to feelings he ought to proceed to file a suit for defamation. But then the plaintiff cannot properly sue the defendant in defamation for reasons I had already stated earlier. Is the plaintiff then devoid of a remedy? Surely the plaintiff must have a remedy. *Ubi jus ibi remedium*; where there is a right there is a remedy. The plaintiff's cause of action in this case can only be in negligence and the trial judge has indeed found the defendant liable in negligence. However the burden still remains with the plaintiff to prove his loss.

The letter from the plaintiff's solicitors dated 9 February 1994 and addressed to the defendant's solicitors needs looking into. The plaintiff has not explained why he did not want the defendant to state that he had indeed settled the claim in full. Further, why did the plaintiff request the defendant to avoid stating in the affidavit that the debt has been settled in full? To my mind this smacks of something improper. Surely it is most important to state in an application to annul the receiving and adjudication orders that the debt has been settled in full.

Further, another issue that militates against allowing this appeal is the delay on the part of the plaintiff to file the application. Unless expressly agreed that the defendant bank would file the application to annul the receiving and adjudication orders, I would have thought that the plaintiff would have forthwith, that is, soon after receiving the defendant's confirmation that it

would support the plaintiff's application to annul, file the said application. Instead the plaintiff was content to let the defendant put in the said application. This delay on the part of the plaintiff has been unexplained.

In any case the plaintiff led no other evidence, other than his own, to seek damages. I am satisfied that the plaintiff has not been able to prove any loss or damages. Even on the question of economic loss the plaintiff led no evidence in support. I am constrained therefore to dismiss this appeal with costs.